Supreme Court, U.S.
FILED
JAN 22 1993
OFFICE OF THE CLERK

No. 92-848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERITECH CORPORATION, *et al.*,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICI CURIAE OF CITIZENS FOR A SOUND ECONOMY FOUNDATION, *ET AL.*, IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37 of the Rules of the Court, *amici* submit to urge reversal of the decision below of the United States Court of Appeals for the District of Columbia Circuit on the ground that the court misconstrued the consent decree at issue and thus did not apply the public interest standard in determining whether there should be modification of the decree

that governs the critically important telecommunications industry.[1]

INTERESTS OF AMICI CURIAE

Amici consist of two groups: (1) disinterested non-profit consumer groups and (2) disinterested academics and telecommunications experts. The latter are Henry Geller, a Duke University professor and communications fellow at the Markle Foundation; Dr. Everett Parker, senior resident associate at Fordham University, and Dr. Barbara O'Connor, a professor who serves as Chair of the Alliance for Public Technology and the California Educational Technology Committee.

Group 1 is an *ad hoc* group of public-interest organizations concerned with the public interest in telecommunications services from the perspective of the residence, people with disabilities, minorities, and other non-profit interests. It has the following groups:

1. *Action for Children's Television* (ACT) is a twenty-year-old, non-profit, tax-exempt membership organization devoted to improving access by children to television and telecommunications programs and services in the United States. ACT has frequently participated before the Federal Communications Commission in regulatory proceedings on behalf of the interests of children in both television and telecommunications matters. ACT is deeply concerned about the potential educational and entertainment value of information

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[1] Counsel for both Petitioners and Respondents have consented to the participation of *amici* in this case, as evidenced in letters filed with the Court. We rely upon Petitioners' brief for the Statement and related preliminary sections.

age services, and that there be affordable access to those services from a diversity of sources. Peggy Charren is President of Action for Children's Television.

2. *American Council of the Blind* is the nation's leading membership organization of blind and visually impaired people. It was founded in 1961 and incorporated in the District of Columbia. The Council's membership numbers in the tens of thousands. The majority of its members belong to one or more of its 71 affiliated organizations. The Council serves to improve the well-being of all blind and visually impaired people. The blind and sight-impaired populations historically have been underserved by technological developments, and are concerned that the telephone network and services offered through the network are fully accessible by all users.

3. *Black Citizens for a Fair Media* (BCFM) is a nonprofit association with 200 members concerned about the role of black Americans in telecommunications. BCFM members use telecommunication services and equipment and are interested in promoting an equitable distribution of telecommunications technology and services to citizens of all income levels, religions, and races.

4. *Church Federation of Greater Chicago, Office of Communications* is composed of 23 communions with more than 3,300 congregations in its membership. The Office of Communications is responsible for the communications and public relations functions of the Federation. The Office of Communications is interested in ensuring that the benefits of technological innovation in telecommunications service be distributed throughout all sectors of society in a fair manner.

5. *Citizens for a Sound Economy Foundation* (CSE Foundation) is a non-profit 501(c)(3) educational institution. With an active membership of 250,000 members, CSE Foundation promotes initiatives that foster economic growth and enhance the quality of life for its members and all consumers.

6. *Consumer Interest Research Institute* (CIRI), a non-profit corporation organized in 1981, prepares analyses of public policies for a variety of consumer groups on issues pertaining to information services and financial services. As a result, CIRI is uniquely situated to analyze the impact of the information services restrictions on consumer groups. Moreover, CIRI has a direct interest in the proceedings before this Court in that the MFJ's restrictions directly impact the consumer groups for which CIRI analyzes public policy. Since CIRI's intervention in 1987, it has published several materials on related issues, particularly the monograph, *The Consumer Interest in Telecommunications Infrastructure Modernization*, by CIRI President Mary Gardiner Jones, for presentation at the 5th Conference on New Directions for State Telecommunications Regulations, January 21-24, 1990, Salt Lake City, Utah. In past years, CIRI has been supported by the following foundations and corporations: The Benton Foundation; The Commonwealth Fund; The Direct Selling Education Foundation; Ford Motor Company; The John D. and Katherine T. MacArthur Foundation; The John and Mary R. Markle Foundation; MCA Foundation; Safeway Stores, Inc.; The Shell Companies Foundation; Philip M. Stern Family Fund; and the Sloan Foundation.

7. *Consumer Research Foundation* (CRF) is a California-based, non-profit research foundation con-

cerned with analyzing issues from a consumer perspective for consumer organizations. CRF President Helen Nelson is a Founder and Past President of the Consumer Federation of America. CRF has studied telecommunications issues from a consumer perspective for a number of years. Ms. Nelson serves on the consumer advisory panel for Pacific Bell, and submitted testimony before the National Telecommunications and Information Administration in its Telecommunications Infrastructure Inquiry.

8. *Council of Chief State School Officers* is a nationwide non-profit organization of the 57 public officials who head the departments of elementary and secondary education in the fifty states, five U.S. extra-state jurisdictions, the District of Columbia, and the Department of Defense Dependents Schools. It has functioned as an independent national council since 1927, and has maintained a Washington office since 1948. Since 1908, chief state school officers have conferred with the federal government "to consider educational interests common to all the states . . . which might presumably be furthered by a free comparison of views."

9. *National Association For Better Broadcasting* (NABB) is a non-profit, educational organization of users of telecommunications services and equipment founded in 1949 to promote the highest standards for radio and television service to the public. With approximately 300 members, NABB represents the interests of citizens employed in the fields of law, sociology, education, mental health, religion, and other professions, as well as the interests of parents and other citizens, all of whom use telecommunications services and equipment. The availability and afford-

ability of telecommunications services to NABB's members is directly affected by the MFJ's restrictions.

10. *National Council of Silver Haired Legislators* (NCSHL) is a non-profit organization of current or past silver haired legislators or senior legislators or whatever term is used in a state having a quasi-legislative body composed of seniors age 60 and over, who generally were elected by their peers. There are approximately twenty-four states with Silver Haired Legislatures. NCSHL provides technical assistance to those states contemplating formation of their own Silver Haired Legislature. NCSHL promotes legislative awareness and advocacy among citizens 60 years of age or over.

11. *The National Indian Youth Council, Inc.* (NIYC) is an Indian rights organization founded in Gallup, New Mexico in 1961. It is Indian conceived and Indian operated. Headquartered in Albuquerque, New Mexico, NIYC is a nationwide organization. Its members also use telecommunications services and equipment. NIYC has a particular interest in promoting access to telecommunication services in remote areas, especially Indian reservations. Recently, NIYC hosted a regional hearing with NTIA on the telecommunications infrastructure.

12. *Northeast Independent Living Program, Inc.* (NILP) is a non-profit 501(c)(3) Massachusetts corporation. NILP strives to be a consumer controlled Independent Living Center providing advocacy and services to the cross disability population who wish to live as independently as possible within the Merrimack Valley. Affordable and accessible telecommunication services are essential tools to achieving these

results. NILP's funding is primarily from governmental and foundation sources.

13. *Telecommunications for the Deaf, Inc.* (TDI), established in 1968, is a non-profit, 17,000 member consumer organization supporting technology in the field of visual communications for the hearing impaired population. TDI functions as an information resource for consumers, businesses, and regulatory agencies, and offers a link to manufacturers of products involving visual technology. The organization annually publishes the International Telephone Directory for TDD Users, and a quarterly newsletter concerning developments in visual technology. TDI members have a special interest in accessibility of the telephone network and of technology, and the potential of that technology to enhance the quality of life of its members.

14. *World Institute on Disability, Inc.* (WID) is a public policy center run by persons with disabilities. WID was established to combat "handicappism." Its goal is to use research, public education, training, and model program development as a means to create a more accessible and supportive society for all people—disabled and non-disabled alike. WID has been deeply involved in fostering accessible and affordable telecommunications services. It has created a Blue Ribbon Telecommunications Panel of leaders from the disability community to evaluate current initiatives and technology and make recommendations regarding the future of this burgeoning industry and how it serves people with disabilities. WID was granted intervenor status for the purpose of appealing the Court's initial decision, and has participated before the FCC and

other regulatory agencies on behalf of Americans with disabilities.

Amici have participated in proceedings involving the Modified Final Judgment (MFJ)[2] because of their interest in promoting the fullest and most effective contribution by the public switched telephone network to (1) improved productivity for U.S. industries in this era of global competition, and (2) the quality of life for all Americans in the emerging information society. The public switched network is of the greatest importance in both respects because it is ubiquitous, universal, and uniform.

Amici strongly support open entry and full competition in the telecommunications field, including at the local level, and believe that governmental policy should not only permit such entry but should facilitate it with effective interconnection and other policies. But *amici* also strongly believe that the public switched network, subject to appropriate safeguards, should be allowed to make a maximum contribution to the welfare of the American people. The local Bell Operating Companies (BOCs) represent the bulk of the public switched network, with over 80 percent of the nation's access lines. Indeed, they represent over one-half of the entire U.S. telecommunications industry. It makes no sense to "park out" such an important segment of this vital industry—yet that is precisely what the MFJ is doing today.[3]

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[2] See *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. *Maryland* v. *United States*, 460 U.S. 1001 (1983).

[3] See, e.g., U.S. Dept. of Commerce, *The NTIA Infrastructure Report: Telecommunications in the Age of Information*, at 213-14 (1991).

Thus, the BOCs cannot make an effective contribution to distance-learning education or to the development of new videotex or similar information services, even though those services would especially benefit the deaf or blind. This telecommunications anomaly results from the fact that the MFJ, which prevents the BOCs from offering services that cross LATAs, forces the BOCs to place complex, expensive computing centers in each LATA.[4]

In addition, because of the manufacturing restriction, the BOCs cannot design, or participate effectively in the development of, telecommunications devices, such as a "tele-mailbox," which might greatly promote the spread of videotex or other information services. Again, these services would especially benefit those with disabilities. The manufacturing restriction has also resulted in inconsistent interpretations, such as allowing BOC participation in software, but not in software associated with telecommunications equipment, often called "firmware" (software that has been placed on a chip). Indeed, we stress that the full effect of the restriction, while very significant, cannot be assessed because it inhibits so much R&D development.[5]

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[4] See 4a-5a, Pet. Br. App., for a description of the LATA concepts (164 local exchange areas).

[5] Thus, while most "high-tech" companies spend eight to nine percent of their total revenues on R&D, the BOCs collectively spend only 1.3 percent. See Statement of Mr. J.L. Clendenin, Chairman of BellSouth Corp., before the Senate Subcommittee on Communications, April 25, 1990, at 15.

Amici therefore have a great interest in a construction of the MFJ that facilitates its modification when the public interest, as evidenced by the position of the lead agency in the competitive arena, the Department of Justice (DOJ), so requests. The construction endorsed by the lower court wholly frustrates that aim.

SUMMARY OF ARGUMENT

The provisions of the decree are not unambiguous. Therefore, they should be construed in light of the decree's clear history and purpose. That critical background establishes that the restrictions stemmed solely from DOJ and were not intended in any way to benefit AT&T. Indeed, at the time the MFJ was formulated, AT&T had a fiduciary duty to all its stockholders to try to avoid or temper the restrictions. It is therefore inconceivable that the DOJ would afford AT&T any decisive role in choosing the modification standard and therefore the ability to block a future modification that DOJ believed would serve the public interest.

Experience has shown that the adoption of the proper standard for modification makes a great difference. The lower court's action endorsing an erroneous construction of the decree therefore has the most serious consequences for the nation's information infrastructure and raises an issue of the utmost importance in the area of global competition and the information society.

ARGUMENT

I. The MFJ can and should be construed so as to make the DOJ the focal point for its modification and thus to facilitate that modification when DOJ concludes that the revision would promote the public interest.

A. The critical background establishes that, if possible, the decree should be construed along the above lines.

The MFJ is a contract between two contesting parties. However, as shown by the Tunney Act requirements, that contract is impressed with the public interest.[6]

The public interest standard governs whether the district court should enter an agreement regarding the MFJ. Moreover, where there is a future agreement as to a modification, the standard governs whether that agreement should be accepted. The critical issue in this case is whether, regarding the BOC restrictions, that future agreement must include AT&T. We submit that the background to the MFJ indicates that it should not.

First, the BOC restrictions stemmed solely from DOJ, and were in no way meant to benefit the future AT&T. This was made clear by AT&T in the Tunney Act proceedings.[7] In addition, AT&T Chairman Charles Brown stated that he was forced by circumstances to accept DOJ's "coherent theory . . . to separate the Bell System's competitive operation from those they considered to be a natural monopoly . . .

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[6] See *United States* v. *American Tel. and Tel. Co.*, *supra*, 552 F. Supp. at 147-153.

[7] See Pet. Br., at 21, n. 19; App. 37a.

its local exchange services. . ."[8] This "clean" but "painful" solution resulted not only in divestiture of the BOCs but also the imposition of the BOC restrictions, because DOJ viewed the BOCs as "natural monopolies." That the restrictions stem solely from DOJ's theory of the case is shown not only by the three core restrictions (interexchange, information services, and manufacturing) but the final "catch-all" that the BOCs were not to "provide any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly actually regulated by tariff."[9]

While the foregoing is conclusive on this point, there is a further consideration establishing that AT&T did not seek these restrictions in order to benefit its future operations—namely, that AT&T then had a fiduciary duty to all its shareholders, including those who would become BOC shareholders, to obtain the best possible deal. See 20a; *United States* v. *American Tel. & Tel. Co.*, *supra*, 552 F. Supp. at 220-21. It could not propose stringent restrictions on the BOCs such as the line-of business constraints. If DOJ insisted, it could only acquiesce in them as the "best deal" possible for its shareholders, including those of the soon-to-be divested BOCs.[10]

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[8] Statement of Chairman Brown, at 4-5, *Disconnecting Bell*, H.M. Shooshan III, Ed., Pergamon Press, N.Y. 1984.

[9] See *United States* v. *American Tel. and Tel.Co.*, *supra*, 552 F. Supp. at 228.

[10] Suppose that instead of leaving the matter in an ambiguous state (see point 2, *infra*), DOJ had drafted a provision stating that if it acquiesced in a BOC proposal to modify one of these restrictions, that would be sufficient to make the public interest standard of Section VII applicable. AT&T could not and would

Thus, the situation plainly is as follow:

(i) The restrictions stemmed solely from DOJ.

(ii) They were not intended to benefit AT&T in any way.

(iii) In this dynamic field, it was recognized that the provisions might have to be modified in light of changed competitive conditions.

(iv) DOJ, as the guardian of competition, would want to facilitate such modifications of the restrictions as it found to be warranted in the public interest (C.A. Br. 27-28). DOJ clearly would not want to give a blocking role to AT&T, a decree party that, like MCI or Sprint, in the future would have a fiduciary duty to its stockholders to raise all conceivable objections to BOC competition in its primary businesses of interexchange service and manufacturing.[11]

(v) It follows that in light of this background, if it is at all possible, the decree should be construed in a common sense way so as not to afford AT&T, the

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not have objected, asserting that its consent was also necessary and that it had the right to bring the matter under the more stringent test of Section VIII(c). That would have been unconscionable—a clear breach of AT&T's fiduciary duty to its then stockholders.

[11] There is a further consideration here. It is widely believed that at some point the BOCs will invade each other's territories, most likely in alliances with other entities such as cable television, cellular, or alternative access carriers. If they do so, and require some modification of the MFJ to be able to provide more effective competition, that proposed modification, if it is supported by DOJ, should be judged under the public interest standard. The BOC being subjected to competition should not have the option to invoke the more stringent Section VIII(c) test. See dissenting opinion, App. 35a.

dominant firm in the interexchange and manufacturing markets, a blocking role. Rather, the decree should make DOJ the focal point for competitive assessment of any modification in the public interest.

B. The decree provisions are ambiguous and therefore can and should be construed along the above lines.

The court below found resort to this background history of "little use" (App. 20a). It could do so if—no matter how clear that background is—the decree provisions unambiguously gave AT&T the right, by withholding its consent, to invoke the VIII(c) test as to any BOC modification of these restrictions rather than the public interest standard. This obviously would be a colossal blunder on the part of DOJ. Unless and until the decree were modified, however, the courts must follow such unambiguous provisions. And the court below did find that AT&T's right in this respect "is not ambiguous" (App. 22a). We urge that this crucial finding is in error.

We recognize that DOJ did err in not specifically dealing with this issue in the decree. We also recognize that DOJ and the parties failed to focus on the issue during the first Triennial Review proceeding (so naturally neither did the court in its review). See App. 23a; 40-41a. It is only with this case that the issue has been presented to the courts. We therefore urge that the issue should and must be resolved based upon the language of the decree.

The sections relied upon by the court below are Section III ("Applicability and Effect"), making the provisions applicable to successors, and Section VII ("Retention of Jurisdiction"), retaining the jurisdiction of the district court for enforcement or modifi-

cation. While the sections clearly bestow rights and duties on the parties, they do not deal with the critical issue of the right of a AT&T or a BOC (see n.11, *supra*) to invoke Section VIII(c) by withholding its consent to a modification that is agreed to by DOJ, and that does not place any restriction on them and was not designed to benefit them. The dissenting opinion (App. 30a-39a) cogently develops this critical point, and no useful purpose would be served by repeating that analysis. It establishes, we believe, that the only sensible decree construction is that urged by DOJ.

C. The issue is one of the greatest importance to the nation because the proper construction of the decree greatly affects the future development of the vitally needed telecommunications industry.

It may be argued that there is no need to take up this issue because, in the future, DOJ will be more careful in drafting the modification provisions of such multi-party decrees. That may be true. However, as we have shown, the proper implementation of *this* decree is of the greatest importance to the nation. It governs the vital telecommunications industry and affects the ability of that industry to respond quickly to dynamic technology and thus to make a maximum contribution to improved productivity of all our industries and to the quality of life of the American people. On this ground alone, review is warranted by this Court.

Finally, it makes a great difference whether the applicable standard for judging the proposed modification in cases such as the instant one is Section VII or Section VIII(c). Under Section VII, changes are granted "if within the reaches of the public inter-

est"—that is, unless they are "certain to lessen competition . . ." (App. 9a). Under Section VIII(c), the standard is much higher for relief. Cf. *United States* v. *Western Electric Co., Inc.*, 529 F. Supp. 846, 868 (D.D.C. 1984). Thus, the court below pointed out that it affirmed ". . . the district court's refusal to lift the decree's ban on the BOCs' manufacture of telephone equipment [under VIII(c)] . . . but reversed a similar refusal to all the Companies to provide information services [under Section VII] . . ." (App. 13a-14a). The court further stated (App. 23a) that ". . . *but for* AT&T's opposition, we would have reversed and remanded the manufacturing portion of *Triennial* just we did the information services portion" (emphasis in original). It thus appears that the manufacturing provision would be gone today, in light of the importance given the DOJ position under the public interest test of Section VII. So also, we believe, would there have been an entirely different result in this case.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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January 22, 1993